

**SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

GEORGE TEREK & SKAGIT COUNTY,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY

Respondent.

SHB NO. 05-015

ORDER GRANTING SUMMARY  
JUDGMENT AND DISMISSING APPEAL

On June 14, 2005, Petitioner George Terek (“Petitioner”) and Skagit County (“County”) filed a petition with the Shorelines Hearings Board (“Board”) for review of a Department of Ecology (“Ecology”) decision dated May 25, 2005. Ecology denied Petitioner’s request for an after-the-fact shoreline variance to retain a sauna, or “emergency shelter” that he had constructed on the edge of his property within the side-yard setback, reducing the setback to zero.

Before the Board is Ecology’s Motion for Summary Judgment on all issues in the case. Board members Bill Clarke, William H. Lynch, Judy Wilson, Mary Alyce Burleigh and Kevin Ranker deliberated on this motion. Administrative Appeals Judge Cassandra Noble presided for the Board. The Board has reviewed and considered the pleadings and other motion papers contained in the Board record, including the following:

ORDER GRANTING  
SUMMARY JUDGMENT  
SHB No. 05-015

1. Ecology's Motion and Memorandum in Support of Summary Judgment;
2. Declaration of Bob Fritzen in Support of Ecology's Motion for Summary Judgment and Exhibits A through H;
3. Petitioner's Memorandum in Opposition to Ecology's Motion for Summary Judgment;
4. Edison Engineering Report, February 9, 2004, submitted by Petitioner;
5. Agreement for Reciprocal Easements, January, 2004, submitted by Petitioner; and
6. Ecology's Reply in Support of Motion for Summary Judgment.

## **I. BACKGROUND**

Petitioner owns residential waterfront property in Anacortes, Washington. In addition to his residence, Petitioner's lot contains a garage, a parking area, a pool, several outbuildings including a guesthouse, and another accessory house. Petitioner's property is situated between Similk Bay on the south and Salmon Beach Road on the north. A steep coastal bluff with bank slopes of 95% fronts the lot over a distance of 36 feet dropping vertically another five feet to the Ordinary High Water Mark (OHWM) with a timber bulkhead. Petitioner's property is designated Rural Residential under the Skagit County Shoreline Management Master Program, which requires eight-foot side setbacks for single-family residential development in the shoreline environment.

In 2003, Petitioner constructed a 12-foot by 17-foot (205 square foot) sauna structure on his east property line. In support of his opposition to Ecology's Summary Judgment Motion,

1 Petitioner submitted no sworn testimony, but he did provide the Board with copies of a letter  
2 report from an Engineer and an easement agreement. Ecology did not object to either document.  
3 However, Ecology asserts that Petitioner has presented no relevant evidence to demonstrate that  
4 there is no reasonable use of the property without the sauna structure. Ecology's Reply Brief,  
5 p.1. Petitioner did not contest the facts as presented through declaration by Ecology.<sup>1</sup> Therefore  
6 the facts submitted by Ecology and Petitioner will be treated as verities.

7 At various times in the permitting process, Petitioner characterized the sauna structure as  
8 an emergency shelter, an underground bunker, a wine cellar, and a bomb shelter with varying  
9 purposes as well. For example, he has suggested that the structure that is the subject of the  
10 appeal was built in order to mitigate problems with soil erosion. In response to this Summary  
11 Judgment Motion, Petitioner submitted copies of a document entitled "Agreement for Reciprocal  
12 Easements" and a letter from engineer Robert P. Bailey, M.S.C.E., P.E. describing the sauna and  
13 its location on the lot. Bailey's letter stated that it is "possible" that construction of the sauna has  
14 helped protect the shoreline environment. The engineer's letter also included an observation that  
15 trees and vegetation had been recently removed to construct the sauna, which may have carried  
16 sediments to the shore. Edison Engineering letter, Feb. 9, 2004.

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20 <sup>1</sup> In response to Ecology's Summary Judgment motion, Petitioner agreed that the facts stated in Ecology's Motion  
21 for Summary Judgment are "generally accurate." Memorandum in Opposition to Ecology's Motion for Summary  
Judgment, p. 2.

1 After Petitioner built his sauna on the neighbor's property line, Skagit County Planning  
2 and Permit Center received a request for investigation from the neighbor<sup>2</sup> complaining that  
3 Petitioner had built a "smoke house" or sauna on the property. A Skagit County code  
4 enforcement officer investigated and confirmed that the structure had, in fact, been built on the  
5 property line and that it did not meet county zoning and shoreline setback requirements.

6 After the County entered a Notice and Order to Abate in April of 2003, Petitioner  
7 submitted shoreline and land use variance applications for after-the-fact approval of the structure  
8 he described then as an underground bunker or wine cellar. The Skagit County Hearing  
9 Examiner denied both the local zoning variance and the shoreline variance in a September 27,  
10 2004 decision. Petitioner appealed the Hearing Examiner's decision to the Skagit County Board  
11 of County Commissioners, which held a closed record appeal hearing and ultimately remanded  
12 the matter back to the Hearing Examiner for clarification of the structure's use, impacts on  
13 neighboring properties, emergency access, and fire risk. On remand, the Hearing Examiner  
14 approved the variances on the condition that the use of the structure be limited to an emergency  
15 shelter and storage cellar. The Hearing Examiner's remand decision was forwarded to Ecology.  
16 Ecology overturned the Hearing Examiner's remand decision and denied the shoreline variance  
17 request on May 24, 2005. In its decision letter, Ecology stated that it did not have the luxury of  
18 ignoring the shoreline variance criteria, and found that the shoreline variance request to reduce  
19 the side-yard setback in order to accommodate the sauna/emergency shelter did not meet the

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20 <sup>2</sup> This neighbor has since conveyed the property and it is now owned by an individual who has apparently entered  
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1 criteria set forth in either Chapter 10 of Skagit County's Shoreline Master Program or in WAC  
2 173-27-170 for granting a variance permit. Ecology, May 25, 2004 decision letter, Ecology's  
3 Memorandum in Support of Motion for Summary Judgment, Exhibit F. In making its decision,  
4 Ecology affirmed the Hearing Examiner's original, pre-remand findings, conclusions, and  
5 decision. Ecology stated that, regardless of the use, whether it was a sauna or a heated  
6 emergency shelter, the Petitioner had failed to demonstrate that the shoreline variance criteria  
7 had been met.

## 8 **II. LEGAL ISSUES**

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10 Generally at issue in this appeal is whether Ecology properly denied Petitioner's  
11 shoreline variance. In the Pre-Hearing Order, the specific legal issues are stated as follows:

- 12 1. Would Appellant Terek have reasonable use of his property without the proposed  
13 sauna/emergency shelter?
- 14 2. Would strict application of the side yard setback standards preclude or  
15 significantly interfere with Applicant Terek's ability to construct the proposed  
16 sauna/emergency shelter?
- 17 3. Would Appellant Terek suffer hardship from denial of a variance and, if so, was  
18 such hardship caused by Terek's own action: the construction of the  
19 sauna/emergency shelter?
- 20 4. Does the sauna/emergency shelter structure meet the variance criteria of WAC  
21 173-27-170(2)(a) through (f)?
5. Is the sauna/emergency shelter structure a priority use under the Shoreline  
Management Act, Chapter 90.58 RCW?

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into an "Agreement for Reciprocal Easements" that shows no acknowledgement or recording.

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### III. ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party as they have been in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Petitioner requested a shoreline variance for his sauna structure. In all instances, applicants for variance permits must demonstrate extraordinary circumstances and that the public interest will suffer no substantial detrimental effect. WAC 173-27-170(1). “[U]nrestricted

1 construction on the privately owned or publicly owned shorelines of the state is not in the best  
2 public interest; and therefore, coordinated planning is necessary in order to protect the public  
3 interest associated with the shorelines of the state while at the same time, recognizing and  
4 protecting private property rights consistent with the public interest. RCW 90.58.020. This  
5 Board has held that, to be eligible for a shoreline variance, a party bears the burden of showing  
6 that all of the criteria in WAC 173-27-170 have been met. *Wriston v. Ecology*, SHB 05-005  
7 (2005).

8 For variances landward of the OHWM, there are seven separate criteria an applicant  
9 must satisfy before a shoreline variance can be granted. A shoreline variance applicant must  
10 demonstrate that all six criteria contained in WAC 173-27-170(2) have been met.<sup>3</sup> In addition,  
11 the cumulative impact of additional requests for similar variances in the area must remain  
12 consistent with the policies of RCW 90.58.020 and not cause substantial impacts to the shoreline  
13 environment. WAC 173-27-170(4).

14 The variance criteria contained in WAC 173-27-170 are as follows:

15 The purpose of a variance permit is strictly limited to granting relief from  
16 specific bulk, dimensional or performance standards set forth in the  
17 applicable master program where there are extraordinary circumstances  
18 relating to the physical character or configuration of property such that the  
19 strict implementation of the master program will impose unnecessary  
20 hardships on the applicant or thwart the policies set forth in RCW  
21 90.58.020.

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<sup>3</sup> Ecology has determined that the variance criteria as contained in WAC 173-27-170(2) are the correct criteria to apply, as Ecology considers them to be more restrictive than those contained in Skagit County Code title 14.26, chapter 10.03. Petitioner does not contest this determination. In any event, the Skagit County criteria are virtually identical to the state criteria set out in the WAC.

1 (1) Variance permits should be granted in circumstances where denial of  
2 the permit would result in a thwarting of the policy enumerated in RCW  
3 90.58.020. In all instances the applicant must demonstrate that  
extraordinary circumstances shall be shown and the public interest shall  
suffer no substantial detrimental effect.

4 (2) Variance permits for development and/or uses that will be located  
5 landward of the ordinary high water mark (OHWM), as defined in RCW  
6 90.58.030 (2)(b), and/or landward of any wetland as defined in RCW  
90.58.030 (2)(h), may be authorized provided the applicant can  
demonstrate all of the following:

7 (a) That the strict application of the bulk, dimensional or  
8 performance standards set forth in the applicable master program  
precludes, or significantly interferes with, reasonable use of the  
property;

9 (b) That the hardship described in (a) of this subsection is  
10 specifically related to the property, and is the result of unique  
11 conditions such as irregular lot shape, size, or natural features and  
the application of the master program, and not, for example, from  
deed restrictions or the applicant's own actions;

12 (c) That the design of the project is compatible with other  
13 authorized uses within the area and with uses planned for the area  
14 under the comprehensive plan and shoreline master program and  
will not cause adverse impacts to the shoreline environment;

15 (d) That the variance will not constitute a grant of special privilege  
16 not enjoyed by the other properties in the area;

17 (e) That the variance requested is the minimum necessary to afford  
relief; and

18 (f) That the public interest will suffer no substantial detrimental  
19 effect...

20 (4) In the granting of all variance permits, consideration shall be given to  
21 the cumulative impact of additional requests for like actions in the area.



1 For example if variances were granted to other developments and/or uses  
2 in the area where similar circumstances exist the total of the variances  
shall also remain consistent with the policies of RCW 90.58.020 and shall  
not cause substantial adverse effects to the shoreline environment.

3 (5) Variances from the use regulations of the master program are  
4 prohibited.

5 173-27-170 (1)(2) & (4) Review Criteria For Variance Permits.

6 The Board has considered Petitioner's proposal in light of the policy enunciated in statute  
7 and WAC as to each of the criteria for variances landward of the high water mark, and in the  
8 context of the facts that are undisputed and the reasonable inferences from those facts in the light  
9 most favorable to Petitioner.

10 1. Reasonable Use - WAC 173-27-170(2)(a)

11 Petitioner is not entitled to a variance if he has some reasonable use of his property  
12 without the use for which the variance is sought. *Kunzler v. Skagit County*, SHB 95-2 (1995).  
13 Petitioner argues that there is a genuine issue of material fact on the issue of whether he has  
14 reasonable use of his property without the sauna in its present location. But the Board agrees  
15 with Ecology that the Hearing Examiner was correct in his original conclusion that the Petitioner  
16 enjoys reasonable use of his property without the sauna. Petitioner already has a residence that  
17 the Hearing Examiner called "sizeable," a garage, a parking area, several accessory buildings,  
18 including a guesthouse, and a pool. With regard to the engineer's comments about bluff erosion,  
19 the Board concludes that Ecology is correct that Petitioner's assertion that his intention was to  
20 make reasonable use of the retaining walls already in place on his property is not the issue in this

1 case. Ecology has argued that "...it was the construction of the sauna or emergency shelter using  
2 the walls that was inappropriate. This construction included roofing the area, adding new walls  
3 to make an enclosure, adding the stove, etc. Appellant offers no rationale for how this  
4 additional construction was consistent with the variance criteria." Ecology's Reply Brief, p.2.  
5 The Board agrees with Ecology that the Petitioner already has reasonable use of his property.

6 2. Unique Circumstances - WAC 173-27-170(2)(b)

7 Petitioner must demonstrate that the variance he seeks is necessary due to extraordinary  
8 circumstances that are unique to his property and that cause him unnecessary hardship. The  
9 Skagit County Hearing Examiner found that, despite the placement of various existing structures  
10 on his property, plus trees and a parking area, the Petitioner had not shown the unavailability of  
11 another location for the sauna on the site that would not intrude on the setback. Skagit County  
12 Hearing Examiner Findings of Fact, September 27, 2004, p.3. Petitioner's claimed hardship is  
13 due to the fact that the sauna structure is already built on the edge of the property. This alleged  
14 hardship is the result of Petitioner's own actions, and was not due to unique characteristics of his  
15 property not shared by other homes in the area that are also located on the shoreline bluff. Thus  
16 Petitioner cannot qualify for a hardship variance.

17 3. Compatibility With Other Authorized Uses - WAC 173-27-170(2)(c)

18 The Board is mindful that this matter came to the attention of the Skagit County code  
19 enforcement authorities in the first place due to a neighbor complaint. Declaration of Fritzen,  
20 August 16, 2005 Exhibit D. Petitioner submitted an "Agreement for Reciprocal Easements."

1 This document may not have the prerequisites for creation of an easement that would survive a  
2 conveyance of either property and does little to suggest that the sauna on the property line is a  
3 compatible use. Also, even if one neighbor has accepted the sauna structure in exchange for a  
4 benefit, it does not necessarily follow that the sauna is compatible with other uses. A private  
5 agreement between neighbors on permissible land uses does not obviate the need to comply with  
6 permit requirements. There is nothing in the record about the compatibility of the sauna  
7 structure with other neighbors' uses, or with the shoreline environment in general.<sup>4</sup> Therefore  
8 Petitioner has not established compatibility with other authorized uses.

9 4. No Grant of Special Privilege - WAC 173-27-170(2)(d)

10 Petitioner has made no specific showing that other residences in the vicinity of his  
11 property have been granted variances and built structures on their property lines with no  
12 setbacks. Furthermore, Petitioner has not provided any evidence that adjacent properties differ  
13 in any way from his property. If the Petitioner is allowed to vary from the setback requirements,  
14 but neighboring properties are not similarly authorized, approval of the variance would grant  
15 him a special privilege in violation of WAC 173-27-170(2)(d). This Board has previously held  
16 that an applicant for a variance cannot demonstrate that an extraordinary circumstance for  
17 granting a variance exists when the Petitioner's lot is buildable and there are lots in the area

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19 <sup>4</sup> The Petitioner attached a February 9, 2004 letter from Edison Engineering to Petitioner's Memorandum in  
20 Opposition to Ecology's Motion for Summary Judgment. This letter states "We understand that many buildings on  
21 Salmon Beach Road are constructed with setbacks that do not conform to the code." The letter does not state the  
basis for this knowledge. Furthermore, the Board has held that a finding of compatibility cannot be substantially  
based upon the existence of a nonconforming use in the area. *Wriston v. Ecology*, SHB No. 05-005 at 24 (Findings  
of Fact, Conclusions of Law, and Order)(2005).

1 similar to the Petitioner's lot. Granting a variance under these circumstances constitutes a  
2 special privilege. *Lux Homes v. Ecology*, SHB No. 04-025, at 28 (Findings of Fact, Conclusions  
3 of Law, and Order)(2005).

4 5. Minimum Necessary - WAC 173-27-170(2)(e)

5 The Petitioner did not provide the Hearing Examiner or this Board with any reason other  
6 than personal preference why the sauna amenity could not be built either on another part of his  
7 lot that does not intrude on the setback, or inside his residence. Petitioner suggests that there is  
8 insufficient space on the lot, but there is no evidence of that. Therefore, Petitioner has not  
9 established that the structure is the minimum necessary for reasonable use of his property. Also,  
10 the Board has found that he already has reasonable use of the property.

11 6. No Substantial Detrimental Effect to the Public Interest - WAC 173-27-170(2)(f)

12 From the evidence submitted, it appears that the public interest would suffer a substantial  
13 detriment if a variance were to be granted in this case. The Board is mindful of the purpose of  
14 any non-conforming use regulation. The legislature enacted the Shoreline Management Act in  
15 part because "...ever-increasing pressures of additional uses are being placed on the shorelines  
16 necessitating increased coordination in the management and development of the shorelines of the  
17 state...uses shall be preferred which are consistent with control of pollution and prevention of  
18 damage to the natural environment, or are unique to or dependent upon use of the state's  
19 shoreline." RCW 90.58.020. In this case, there is no injustice in refusing an after-the-fact  
20 variance where the Petitioner built his structure in disregard of setbacks, neighbors' rights, and  
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1 the Skagit County permitting process.

2 “Reasonable setback requirements are an accepted land use tool and all property tends to  
3 benefit from their enforcement.” Buechel 125 Wn.2d at 210. A variance is not an entitlement,  
4 particularly when someone has reasonable use of property already. The Board agrees with  
5 Ecology that the sauna structure is an amenity and that Petitioner had no reasonable justification  
6 for expanding into the side yard setback area to allow for this accessory structure. The fact that  
7 the sauna was already built when Petitioner applied for a variance after the previous neighbor’s  
8 complaint to the County cannot qualify the structure for a shoreline variance.

9 Based upon the above, this Board agrees with Ecology that, regardless of the use of the  
10 structure, the applicant has failed to demonstrate that the criteria for a granting of a shoreline  
11 variance have been met.

12 7. Cumulative Effects – WAC 173-27-170(4)

13 In the granting of shoreline variances, it is proper to consider cumulative effects. *Buchel*  
14 *v. Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994). It is unclear from the record if adjacent  
15 properties will be in a position to also request variances from the setback requirements if this  
16 variance is granted.

17 **ORDER**

18 Respondent Department of Ecology’s Motion for Summary Judgment is GRANTED and  
19 Department of Ecology’s Decision denying Petitioner’s Variance Permit application is  
20 AFFIRMED.

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ORDER GRANTING  
SUMMARY JUDGMENT  
SHB No. 05-015

1 Done this 8th day of December 2005.

2 **SHORELINES HEARINGS BOARD**

3 Bill Clarke, Chair

4 William H. Lynch, Member

5 Mary Alyce Burleigh, Member

6 Kevin Ranker, Member

7 Judy Wilson, Member

8 Cassandra Noble

Administrative Appeals Judge, Presiding

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